Supreme Court, U.S.
FILED
DEC 6 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-5319

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

PAUL MCNEIL,
Petitioner,

v.

WISCONSIN,
Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 30, 1990
CERTIORARI GRANTED OCTOBER 29, 1990

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CHRONOLOGY OF RELEVANT EVENTS AND DOCKET ENTRIES

DATE	PROCEEDINGS
May 18, 1987	Town of Caledonia Police Department prepares a request for a warrant to charge the Petitioner with various offenses including party to a crime first degree murder
May 20, 1987	Petitioner is taken into custody by Milwaukee County Deputy Sheriffs to be returned to Milwaukee, Wisconsin for charges of armed and masked robbery
May 22, 1987	Petitioner appears before a Milwaukee County Judicial Court Commissioner for an initial appearance with an appointed attorney on the charges of armed and masked robbery; bail is set and the matters are scheduled for a preliminary hearing
May 22, 1987	After his initial appearance in court, while in custody, Petitioner is questioned regarding the Town of Caledonia murder and a statement is obtained
May 24, 1987	While in custody, Petitioner is questioned regarding the Town of Caledonia murder and a statement is obtained
May 26, 1987	While in custody, Petitioner is questioned regarding the Town of Caledonia murder and a statement is obtained
May 27, 1987	The Town of Caledonia request for warrant dated May 18, 1987, is received by the Racine County District Attorney and a complaint and warrant charging Petitioner with party to a crime first degree murder and other offenses is issued

DATE	PROCEEDINGS
June 4, 1987	Petitioner makes his first appearance in Racine County, Wisconsin, on criminal charges including party to a crime first degree murder; bond is set and a preliminary hearing is scheduled
July 9, 1987	Motions are filed including motions to suppress Petitioner's statements
December 14, 1987	Petitioner's motion to suppress statements is denied
January 19, 1988	Petitioner enters plea of guilty to amended charge of second-degree murder, attempted first degree murder, and armed burglary, all as party to a crime
March 18, 1988	Petitioner sentenced to imprisonment for a total of 60 years
February 15, 1989	Hearing on Petitioner's motion to withdraw guilty plea
February 28, 1989	Written decision denying motion to withdraw guilty plea is filed by the trial court
March 16, 1989	Notice of Appeal filed
May 2, 1990	Supreme Court of the State of Wisconsin affirms the ruling of the trial court

REQUEST WARRANT

Date Submitted 5-18-87
Police Agency CA
DOB 03-05-61
Sex/Race M/Black
Ht/Wt 506/140
Eyes/Hair Bro/Blk
Comp No 2485-8
Arrest No 289B to
Time Request Warrant

Defendant McNEIL PAUL MATTHEW
Address 1833 N. 25th St. Milwaukee, WI.
Date of Offense March 9, 1987
Place of Offense 12105 Adams Rd. Town of Caledonia
Arresting Officer(s) Sgt. R. Stauss
Offense

PTAC FIRST DEGREE MURDER
PTAC Att. FIRST DEGREE MURDER
PTAC BURGLARY
PTAC Strong Arm Robbery

Section

940.01(1)
940.01(1)
943.10(2d)
943.32(1)

Victim
Restitution Amount $ See report.
Owed to See report.

Pertinent Information Suspect is currently being held by the Omaha Nebraska Police Department on warrants issued in Wisconsin for being a party to armed robbery. Milwaukee Co. Sheriff's Department is handling the warrants and suspect may waive extradition. . . . .

/s/ Sgt. [Illegible]

ACTION TAKEN BY DISTRICT ATTORNEY

Received on 5-27-87 By CMR Assigned to Date

☐ Complaint Only Offense as requested

☐ Complaint & Summons

☒ Complaint & Warrant Section

☐ Criminal Complaint will not be issued because

Prosecutor /s/ Gerald P. Ptacek Date 5/27/87

MILWAUKEE COUNTY SHERIFF'S DEPARTMENT

STATEMENT OF YOUR RIGHTS

Place Douglas Co. Jail

Date May 20th, 1987

Time 2:00 PM

Before we ask you any questions, it is my duty to advise you of your rights.

You have a right to remain silent.

Anything you say can and will be used against you in a court of law.

You have the right to consult with a lawyer before questioning and to have a lawyer present with you during questioning.

If you cannot afford to hire a lawyer, one will be appointed to represent you at public expense before or during any questioning if you so wish.

If you decide to answer questions now without a lawyer present, you have the right to stop the questioning and remain silent at any time you wish, and the right to ask for and have a lawyer at any time you wish, including during the questioning.

WAIVER—

Do you understand each of these rights? Yes

Realizing that you have these rights do you wish to answer questions or make a statement now? No.

WAIVER OF RIGHTS

I have read this statement of my rights and I fully understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed /s/ Paul McNeil

Witness: /s/ Eugene Welch

Witness: /s/ [Illegible]

Time: 2:05 PM

STATE OF WISCONSIN
CIRCUIT COURT
MILWAUKEE COUNTY

Case No. L-8411

STATE OF WISCONSIN,
Plaintiff,

vs.

PAUL M. MCNEIL,
Defendant.

JUDGMENT ROLE

May 22, 1987

Frank J. Liska, Jr.
Judicial Court Commissioner

Sharon Best
Court Reporter

Deft. in court (Paul M. McNeil) with Atty. Joseph Caton, Assistant D.A. Warren Zier.

Defendant given a copy of complaint and advised of contents. Defendant advised of maximum sentence and right to counsel. Court reviewed complaint and finds probable cause to hold defendant for further proceedings.

Statement by Public Defender J. Caton/Defendant indigent and Public Defender will provide counsel.

Case adjourned for Preliminary Hearing to 5-28-87, 1:30 p.m. in Branch 30.

Bail: $25,000 cash.

STATE OF WISCONSIN
CIRCUIT COURT
MILWAUKEE COUNTY

Case No. L-8411

STATE OF WISCONSIN,
Plaintiff,

vs.

PAUL M. MCNEIL,
Defendant.

May 22, 1987

Before
Frank J. Liska, Jr.
Judicial Court
Commissioner

CHARGE: ROBBERY, ARMED AND MASKED
PARTY TO A CRIME (3 Counts)

[2] PROCEEDINGS

THE BAILIFF: This is Case No. L-8411, State of Wisconsin vs. Paul M. McNeil, Armed and Masked Robbery, Party to a Crime, three counts.

These are all Class B felonies. The maximum possible penalty is imprisonment for not more than 20 years as to each count. Do you understand the possible penalties, Mr. McNeil?

THE DEFENDANT: Yes, I do.

MR. ZIER: Actually, that's 25 years each count and a $10,000 fine or both. Because they're charged as masked and concealed.

MR. CATON: Mr. McNeil appears subject to reservation of jurisdictional objections, Joseph Caton with him. We have the complaint and waive its reading. I have read it to him.

Should you find it states probable cause, he will request a preliminary examination.

THE COURT: I'll make a finding of probable cause. We went through this drill once before, didn't we?

MR. CATON: Yes.

MR. ZIER: No, this is a three-defendant case.

MR. CATON: Mr. Dixon has gone through prior.

[3] THE COURT: Oh, okay, that's right. Yes, the reason they got him first is because his license plate said H. Dixon.

Having found probable cause, what bail is being requested?

MR. ZIER: $25,000 cash. There isn't an in-depth explanation of the reason for that, but it appears, at least from the complaint and the reports involved, that Mr. McNeil was really one of the principals involved here. Additionally, as the Court file may indicate, he was extradited from Nebraska. Actually, he wasn't extradited. He waived extradition from Nebraska.

I think in light of the offenses, of the exposure that he's facing, his obvious ability for interstate travel, I think that significant cash bail is appropriate. And I think that $25,000 is appropriate.

THE COURT: Considering that we eventually found him in Nebraska, Mr. Caton, boy, $25,000 seems to be really on the money.

MR. CATON: I have some things to say that may affect the cash amount. I don't have the judgment role with me, but is it true that Mr. Dixon got a $10,000 cash bail?

THE COURT: Could well be.

[4] MR. CATON: It may be academic, but this man is 26, single, he has two children in Milwaukee. He's been residing with the mother, Sandra Hall, at 5424

West Garfield. He had been in Milwaukee three years. He's got some extended family in Milwaukee, including his mother at 1833 North 25th, Rosie Rogers. He has six siblings in Milwaukee.

His prior record consists of a conviction in 1980 for a robbery. He's a high school graduate. He's in good health. He needs to deal with cocaine abuse. He's had some cardiac complications as a result of his cocaine abuse.

What I would ask you to consider is that when he learned that authorities from Wisconsin were seeking him in Omaha, he turned himself in and then he waived extradition to come back to Milwaukee. That he has roots here; that he does not have a lengthy prior record.

$25,000, I believe, is excessive under the circumstances given the other conditions—rather, elements of the bail.

THE COURT: One of the things that I asked at the hearing of Mr. Dixon was where were the other guys. And the officer who was standing here—either the officer who was standing here or the District Attorney who was standing here had some knowledge of the [5] surrounding facts. And his indication was that they believe that the jurisdiction was left behind by the other two because they knew that Mr. Dixon had been captured by the police. And apparently we still have one out. And he has still taken his leave of our hospitality.

Now, I recognize fully, fully the ties that Mr. McNeil has to this community. However, I must also recognize that having committed what are clearly some of the most serious offenses that we have on the books, that he has taken leave of our hospitality. He may have had second thoughts, but as we approach trial he may have second thoughts again. It looks like a very, very serious case.

He demonstrated his interstate capability. And it occurs to me that in order for me to be satisfied that Mr. McNeil is going to remain with us, that he will have to get sufficient numbers of his friends and relatives together to come up with $25,000 cash. I recognize fully

that he himself may not have those assets, but his assets and his strength and it is no less an asset than cash in the bank, is your friends, your relatives and community ties. It's your reputation. If they believe he's going to stay, I have no doubt that they will come up with $25,000.

MR. CATON: We request a preliminary examination.

[6] THE COURT: Carl, did you have anything to add?

MR. MANSKE: We're just recommending that we supervise him on a—supervise him while the case is pending and that we do random urine surveillance and some drug treatment.

THE CLERK: 5-28, 1:30.

MILWAUKEE COUNTY SHERIFF'S DEPARTMENT

STATEMENT OF YOUR RIGHTS

Place 821 W. State

Date 05-22-87

Time 755 PM

Before we ask you any questions, it is my duty to advise you of your rights.

You have a right to remain silent

Anything you say can and will be used against you in a court of law.

You have the right to consult with a lawyer before questioning and to have a lawyer present with you during questioning.

If you cannot afford to hire a lawyer, one will be appointed to represent you at public expense before or during any questioning if you so wish.

If you decide to answer questions now without a lawyer present, you have the right to stop the questioning and remain silent at any time you wish, and the right to ask for and have a lawyer at any time you wish, including during the questioning.

WAIVER———

Do you understand each of these rights? Yes.

Realizing that you have these rights do you wish to answer questions or make a statement now? Yes.

———————

WAIVER OF RIGHTS

I have read this statement of my rights and I fully understand what my rights are. I am willing to make a

statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed /s/ Paul McNeil

Witness: /s/ [Illegible] Detective

Witness: ———————

Time: 8 PM—(2000 Hrs)

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH IV

RACINE COUNTY

87CF337

STATE OF WISCONSIN,
Plaintiff,

vs.

PAUL MCNEIL,
Defendant.

DECISION

Motion was brought before the Court for a new trial based on ineffective assistance of counsel. The defendant bases his claim because during a motion to suppress statements taken from the defendant, the Court was not presented with the proper record, nor was the case of *U.S. Ex rel Espinoza vs. Fairman*, 813 F. 2d, 117 (7th Cir. 1987) argued to the Court, which would have enabled it to make a proper decision suppressing all statements of the defendant.

To prevail on this motion, the defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense.

The case which is cited by the defense is a case decided by the Seventh Circuit Court of Appeals, and it had been decided several months prior to the date of the motion brought before the Court. It is uncontroverted that there are no Wisconsin cases that have decided this issue in the same manner as the Seventh Circuit Court has.

There is also case law to the effect that the state courts are not bound by all decisions of the federal courts, and that the Seventh Circuit case may not be precedential.

The Court having heard testimony and having read the law presented by the parties makes the following Findings of Fact:

That defense counsel's performance was not deficient.

That the record as a whole, and the Court has gone over the whole record, shows that counsel argued at length the motions to suppress and submitted briefs to that effect and represented the defendant in a way which was more than just able and competent.

That the nonarguing of this federal case before the trial court was not a deficient performance which would have prejudiced the defense.

The Court, after looking at the whole record, finds that its decision on motions to suppress would have been the same even if that case would have been argued, as there are no Wisconsin cases upon which the Court could have relied. Therefore, the motion of the defendant is denied.

Dated February 28, 1989.

BY THE COURT:

/s/ Emmanuel J. Vuvunas
HON. EMMANUEL J. VUVUNAS
Branch IV

IN COURT OF APPEALS OF WISCONSIN
DISTRICT II

No. 89-0539-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

PAUL MCNEIL,
Defendant-Appellant.

CERTIFICATION

[Filed Nov. 1, 1989]

Before Brown, P.J., Scott and Nettesheim, JJ.

Pursuant to Rule 809.61, Stats., this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

Does an accused's request for counsel at an initial appearance on a charged offense constitute an invocation of his fifth amendment right to counsel that precludes police-initiated interrogation on unrelated, uncharged offenses? [1]

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[1] McNeil raises two additional issues on appeal. He argues that: (1) the state deliberately delayed the filing of the murder charge to further interrogate him so as to obtain a "sew-up" confession, thereby violating his right to due process of law; and (2) the trial court erred in refusing to allow him to withdraw his guilty plea. Upon a review of the record, we conclude that resolution of neither of these issues would resolve the issue that we certify.

FACTS

On May 21, 1987, Paul M. McNeil was escorted from Ohama, Nebraska by two Milwaukee county deputies acting on a criminal complaint and warrant charging McNeil with an armed robbery in West Allis. The deputies knew that McNeil was also a suspect in a Racine county murder and robbery.

The day before, while McNeil was in custody in the Omaha jail, the deputies had advised him of his *Miranda* rights. He declined to talk to them and the conversation ended. On the way back to Milwaukee, the deputies did not question McNeil about either the Milwaukee county robbery or the Racine county murder and robbery, but told him it would be to his advantage to tell his side of the story.

An initial appearance on the Milwaukee county robbery was held on May 22, 1987. McNeil was represented by a public defender. Later that evening, a Milwaukee county detective went to McNeil's cell to question McNeil about the robbery. After being advised of his rights and signing the waiver, McNeil himself brought up the Racine county murder. The questioning remained on that subject for the rest of the session.

Questioned again on May 24 and 26 about the Racine county crimes, McNeil gave inculpatory statements. Prior to each interrogation session, McNeil was advised of his rights and signed a waiver of them. On May 27, a criminal complaint was filed formally charging him with the Racine county murder and robbery. Motions to suppress his inculpatory statements were denied. Upon a plea of no contest, he was ultimately convicted of being a party to the crimes of second-degree murder, attempted first-degree murder and armed robbery.

McNeil now appeals the denial of the suppression motions, asserting that the statements were obtained in violation of his fifth amendment right to counsel.

DISCUSSION

McNeil contends that his request for counsel at the initial appearance constituted an invocation of his right to counsel under both the fifth and sixth amendments. He further claims that such invocation precluded all further police-initiated interrogation without the presence of counsel whether the interrogation concerned the charged offenses or an uncharged, unrelated one.

The fifth amendment's prohibition against compelled self-incrimination requires that custodial interrogation be preceded by advice that the individual has the right to remain silent and also the right to the presence of an attorney. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

When an accused invokes his fifth amendment right to have counsel present during custodial interrogation, unless he himself initiates the communication, exchanges or conversations with the police, he is not subject to further interrogation on that charge until counsel has been made available to him. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). Even if he has been advised of his rights, a valid waiver cannot be established by showing only that he responded to further police-initiated custodial interrogation. *Id.* at 484.

The *Edwards* rule has been expanded to apply when an accused invokes his sixth amendment right to counsel. *Michigan v. Jackson*, 475 U.S. 625, 636 (1986). Thus, invoking one's sixth amendment right to counsel on a given offense, as McNeil did in accepting representation at the initial appearance on the Milwaukee county robbery, precludes further police-initiated interrogation on that charge unless counsel is present. *Id.*

When invoked on fifth amendment grounds, the *Edwards* rule has also been expanded to include uncharged offenses. *Arizona v. Roberson*, 486 U.S. 675, ——, 108 S. Ct. 2093, 2099 (1988). Under *Roberson*, when a suspect invokes his fifth amendment right to counsel during

custodial interrogation, the rule bars police-initiated interrogation even on a separate, unrelated offense. *Id.* However, McNeil does not claim that he specifically invoked his fifth amendment right to counsel during custodial interrogation.

But McNeil does assert that the *Edwards* rule should be applied in his case nonetheless. He argues that because he was in continuous custody, invocation of his sixth amendment right to counsel should trigger the fifth amendment-based *Edwards* rule as to any other offense as well. In other words, he contends that acceptance of the public defender's services at the initial appearance constituted a general request for the assistance of counsel, a request broad enough to also preclude police-initiated questioning, in the absence of counsel, on other charges.

Wisconsin courts have never addressed this precise question.[2] The Seventh Circuit Court of Appeals has, however, in *United States ex rel. Espinoza v. Fairman*, 813 F.2d 117 (7th Cir.), *cert. denied*, 483 U.S. 1010 (1987), and McNeil urges that Wisconsin follow its lead.

The facts in *Espinoza* closely parallel those in McNeil's case. Espinoza, arrested on a weapons charge, was represented by counsel at his arraignment on that charge. Later, while still in custody but without the presence of counsel, he was interrogated about an unrelated murder to which he confessed. At his trial on the murder charge, the court denied his motion to suppress the confession, and he was convicted.

---

[2] This court addressed a similar, though not identical, scenario in *State v. Lale*, 141 Wis.2d 480, 415 N.W.2d 847 (Ct. App. 1987). There, expressly adopting *Maine v. Moulton*, 474 U.S. 159 (1985), and *Moran v. Burbine*, 475 U.S. 412 (1986), we held that an unrepresented defendant's incriminating statements to the police on unfiled charges were admissible because the sixth amendment right to counsel was not implicated as to those charges. *Lale* did not, however, address the fifth amendment question McNeil poses.

After exhausting his state remedies, Espinoza petitioned for a writ of habeas corpus. The district court granted the writ, holding that Espinoza had both a fifth and sixth amendment right to counsel at the interrogation and that he had not validly waived either right.

The Seventh Circuit Court of Appeals affirmed the decision, but on different grounds. The appeals court disagreed that a sixth amendment right to counsel attached at the time of interrogation. *Id.* at 120. Though Espinoza plainly had a fifth amendment right to counsel at that point, he had not invoked it. However, the court determined that the invocation at his arraignment of his sixth amendment right to counsel also constituted an invocation of his fifth amendment right. The court held that, absent evidence to the contrary, an individual who requests counsel at the time of his arraignment on a criminal charge is presumed to invoke both his fifth and sixth amendment rights to counsel. *Id.* at 123.

The state argues that Wisconsin need not, and should not, follow *Espinoza*. *Espinoza* need not be followed because federal appeals court decisions are not binding on Wisconsin state courts. *Thompson v. Village of Hales Corners*, 115 Wis.2d 289, 307, 340 N.W.2d 704, 713 (1983).

Espinoza should not be followed, the state continues, because it contends the decision is wrong. The state maintains that requesting counsel at an initial appearance does not invoke one's fifth amendment right to counsel, and thereby trigger the *Edwards* rule, because a fifth amendment right to counsel attaches only when an accused is both in custody, *United States v. Henry*, 447 U.S. 264, 273 n.11 (1980), and subject to interrogation, *Rhode Island v. Innis*, 446 U.S. 291, 298 (1980). McNeil was in custody at the initial appearance, but he was not subject to interrogation.

The state further asserts that requesting counsel at an initial appearance does not trigger the *Edwards* rule as to other, unrelated charges because that rule is prophylactic in nature and is meant to protect the exercise of one's fifth amendment rights from government coercion. *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987).

The danger of government coercion is not similarly present, the state argues, where the accused has not requested counsel either in the context of custodial interrogation or in response to *Miranda* warnings. In fact, McNeil was questioned on the separate charge only after being fully, and repeatedly, apprised of his *Miranda* rights, including the right to counsel.

In further support of the premise that his request for counsel at the initial appearance on the robbery charge invoked his fifth amendment right to counsel for all purposes, McNeil maintains that an invocation of the right to counsel is to be given a "broad, rather than a narrow, interpretation." *Espinoza*, 813 F.2d at 123 (quoting *Jackson*, 475 U.S. at 633). McNeil claims the state failed to show that he intended to limit the exercise of his right to counsel to the initial appearance on the robbery charge, and therefore it must be presumed that he intended also to invoke his fifth amendment right.

The state counters that the issue is not how broadly the request for counsel should be interpreted, but whether such a request was made at all. Moreover, interpretation is required only where the individual's words, understood as ordinary people would understand them, are ambiguous. *Barrett*, 479 U.S. at 529. Here, McNeil himself brought up the Racine county crimes and signed several written waivers of his right to counsel. In addition, he questioned the necessity of the repeated *Miranda* warnings, stating he understood his rights because he had been advised of them numerous times.

In sum, several United States Supreme Court cases offer a measure of direction on the resolution of this case,

though none answers it completely. *Edwards* holds that once the fifth amendment right to counsel is invoked during custodial interrogation, no further interrogation without counsel is allowed unless the individual initiates it. Under *Jackson*, further police-initiated interrogation on the same charge is prohibited whenever the sixth amendment right to counsel is invoked, not just during custodial interrogation. And *Roberson* says that invoking one's fifth amendment right to counsel during custodial interrogation precludes further police-initiated interrogation, without counsel, on any charge.

McNeil does not claim to have specifically invoked his fifth amendment right to counsel. He argues that the invocation of his sixth amendment right at the initial appearance on the Milwaukee county armed robbery charge should also be construed as an invocation of his fifth amendment right to counsel as to any other offenses because he was in continuous custody. McNeil's position is consistent with that assumed by the Seventh Circuit in *Espinoza*.

CONCLUSION

No Wisconsin law exists on the precise scope of the rights invoked when an individual requests the assistance of counsel. Supreme Court direction is desirable. For these reasons, we respectfully certify this case to the Wisconsin Supreme Court for review and determination, pursuant to Rule 809.61, Stats.

SUPREME COURT OF WISCONSIN

No. 89-4539 CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

PAUL MCNEIL,
Defendant-Appellant.

Argued January 26, 1990—Decided May 2, 1990

(On certification from the court of appeals)

STEINMETZ, J. The issue certified is whether an accused's request for or appearance with counsel at an initial appearance on a charged offense constitutes an invocation of his fifth amendment right to counsel that precludes police-initiated interrogation on unrelated, uncharged offenses. The trial court answered "no" and we agree.

Other issues in the case include whether the state illegally delayed filing the murder charges to conduct further investigation so as to obtain a sew-up confession. The trial court answered "no." We do not believe the issue presented is consistent with the facts.

Another issue before us is whether the defendant's statements should have been suppressed because they were obtained in violation of the defendant's fifth amend-

ment right to be silent. The trial court answered "no" and we agree.

The final issue raised is whether the trial court should have allowed the defendant to withdraw his guilty plea and granted him a new trial. The trial court answered "no" and we agree.

The case is before the court by certification from the court of appeals granted pursuant to Rule 809.61, Stats. Paul McNeil, the defendant-appellant, seeks review of a judgment of conviction entered on March 18, 1988. Racine county circuit court Judge Emmanuel J. Vuvunas entered judgments of convictions against the defendant for the crimes of party to second-degree murder, party to attempted first-degree murder, and party to armed burglary. The sentence imposed by the judge was an indeterminate term of not more than 20 years for the party to second-degree murder conviction, 20 years for the party to attempted first-degree murder, and 20 years for party to armed burglary, all counts to be consecutive to one another for a total of 60 years.

This matter was initiated by a felony warrant request by Sergeant Robert Stauss of the town of Caledonia Police Department of the Racine county district attorney's office. The complaint was issued on May 27, 1987, by the then Racine county District Attorney Gerald Ptacek.

The warrant was served on the defendant who was being held in the Milwaukee county jail on an unrelated armed robbery charge and was brought before a Racine county magistrate on June 4, 1987. A preliminary examination was held on June 11, 1987, and subsequently various motions including motions to suppress the defendant's statements were filed. Judge Vuvunas denied the motions to suppress after five hearings were held.

A postjudgment notice of motion and motion to withdraw the guilty plea were presented. The motion re-

quested a withdrawal of the defendant's guilty plea as a result of a manifest injustice because the court had ruled improperly when it ruled in favor of the state and against the claim of ineffective assistance of counsel. McNeil argued that defense counsel was incompetent during the course of the hearings on suppression of statements because counsel did not bring to the court's attention the most recent case law and supporting facts dealing with defendant's situation.

On hearings on the motion to withdraw the guilty plea, Judge Vuvunas ruled that trial counsel had not been ineffective and that he was now considering the case law and record which may not have been available earlier. He stated that even if he had been aware of the case law at the time he made his original decision, he would have ruled the same way and allowed the defendant's statements to be admitted into evidence.

The development of this case begins on May 21, 1987, when two Milwaukee county deputies escorted the defendant back to Milwaukee from Omaha, Nebraska. They had taken defendant into custody on a criminal complaint and warrant charging him with an armed robbery arising out of an incident in the city of West Allis in Milwaukee county. The following day, May 22, 1987, the defendant was brought before court commissioner Frank J. Liska, Jr. in Milwaukee county. Bail was set and the matter was scheduled for a preliminary examination. The defendant had an attorney with him in court at that time.

Later in the day on May 22, and again on May 24 and May 26, still in the custody of the Milwaukee authorities, the defendant was interrogated regarding the episode that was to provide the basis for the criminal charges in this Racine county prosecution. Those charges were made by the filing of a criminal complaint on May 27, 1987. An initial appearance on those charges was held on June 4, 1987, in Racine county pursuant to a writ.

The critical question that must be answered in resolving the issue of the admissibility of the defendant's statements is whether an accused who has requested counsel at his initial appearance has thereby invoked not only his sixth amendment right to counsel, but his fifth amendment right to counsel as well.

The defendant appeared at his initial appearance in Milwaukee county for the unrelated offense of robbery. There he was represented by an attorney from the public defender's office. The record does not reveal whether he requested counsel at his initial appearance, only that he appeared with counsel at that appearance.

Defendant contends that since he appeared with counsel at the initial appearance on the unrelated Milwaukee county charge which triggered his sixth amendment right to counsel, he could not be subject to any further interrogation by the authorities about any offenses, including the Racine county offenses charged in this case, unless he initiated further communication, exchanges, or conversations with the police pursuant to *Edwards v. Arizona*, 451 U.S. 477 (1981). Under the *Edwards* rule, when a suspect invokes his fifth amendment right to counsel during a custodial investigation, no further interrogation may be commenced by the authorities until counsel has been made available to him, unless he himself initiates further communication, exchanges, or conversations with the police. *Id.* at 484-85.

The defendant contends that his appearance with counsel at the initial hearing on the Milwaukee county charges constituted an invocation of his sixth amendment right to counsel that under the fifth amendment *Edwards* rule precluded the police from initiating any further interrogation of him, including questioning regarding the unrelated Racine county crimes. He argues that because it was the police that initiated the further interrogation that produced his statements regarding the Racine county

crimes, those statements should have been suppressed under the *Edwards* rule.

There are two distinct rights to counsel when a defendant is interrogated by the police. The first is the fifth amendment right to counsel recognized in *Miranda v. Arizona*, 384 U.S. 436, 470 (1966). That right applies whenever a defendant is subjected to custodial interrogation irrespective of whether or not he has been formally charged with the offense to which the interrogation relates. *Id.* at 471. That right to counsel is not directly conferred by the fifth amendment, but rather is a prophylactic rule designed to safeguard the privilege against self-incrimination that is directly conferred by the fifth amendment. *See Solem v. Stumes*, 465 U.S. 638, 644 n.4 (1984).

The other right to counsel potentially applicable at an interrogation is the guarantee of the assistance of counsel in criminal proceedings directly conferred on a defendant by the sixth amendment.[1] That right to counsel attaches only "at or after the time that judicial proceedings have been initiated against [the accused]—'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *Brewer v. Williams*, 430 U.S. 387, 398 (1977). Such right is only applicable to interrogation that occurs subsequent to the initiation of formal judicial proceedings relating to the charge about which the interrogation is concerned.

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[1] The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accussed shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defense.

Although it was initially recognized only in the fifth amendment context, the *Edwards* rule also applies to an invocation of the sixth amendment right to counsel. Thus, the *Edwards* rule also applies whenever an accused invokes his sixth amendment right to counsel, not just when he invokes it during the course of custodial interrogation. The invocation of right to counsel at an initial appearance will therefore trigger the *Edwards* rule. *See Michigan v. Jackson*, 475 U.S. 625, 636 (1986).

While the *Edwards* rule applies to both the fifth and sixth amendment rights to counsel, the scope of its application differs depending on which of the two rights is being invoked. In the fifth amendment context, an invocation of the right during custodial interrogation precludes further questioning on any offense, not just the one that was the subject of the interrogation. *Arizona v. Roberson*, 486 U.S. 675, 685 (1988) (distinguishing the sixth amendment right to counsel from the fifth amendment prophylactic right to counsel to protect against self-incrimination).

In contrast, an invocation of the sixth amendment right to counsel on one offense does not trigger the *Edwards* rule with respect to interrogation on other offenses, at least not those that have not been charged. As to the uncharged offenses, an accused has no sixth amendment right to counsel, so interrogation on those uncharged offenses cannot be deemed "in derrogation of [the] Sixth Amendment right invoked [by the accused] at his arraignment" on a charged offense. *People v. Buckles*, 155 Mich. App. 1, 399 N.W.2d 421, 423 (1986). Since there is no sixth amendment right to counsel on uncharged offenses, an invocation of that right at an initial appearance or arraignment on a charged offense does not bring the expanded scope of the fifth amendment *Edwards* rule into play with respect to interrogation on uncharged offenses. *See Moran v. Burbine*, 475 U.S. 412, 431 (1986); *Maine v. Molton*, 474 U.S. 159, 180 n.16 (1985).

The defendant cites a case from the Seventh Circuit Court of Appeals as indistinguishable. *United States ex rel. Espinoza v. Fairman*, 813 F.2d 117, 123 (7th Cir. 1987), expressly held: "that individuals who invoke their right to counsel at their arraignment are invoking both their Sixth Amendment and their Fifth Amendment rights." This court is not bound by the *Espinoza* holding as precedential value. *State v. Webster*, 114 Wis. 2d 418, 426 n.4, 338 N.W.2d 474 (1983).

Likewise, the United States Supreme Court has recently ruled on *Butler v. McKeillar*, —— U.S. —— (March 5, 1990). The facts in *Butler* indicate that, unlike McNeil, the defendant invoked his fifth amendment right to counsel upon arrest on an unrelated assault and battery charge. The defendant then retained counsel who appeared with him at a bond hearing on the unrelated charge on August 31, 1980. The defendant was subsequently informed that he was a suspect in a murder. He was read his *Miranda* rights, stated he understood his rights and signed two waiver forms. The defendant was interrogated concerning the murder and confessed. At no time did he request counsel during this interrogation. The defendant was charged with the murder and convicted.

The issue before the United States Supreme Court in *Butler* concerns the retroactivity on collateral attack of *Roberson*. The *Butler* Court held that *Roberson* was not retroactive on collateral attack, and it affirmed Butler's conviction.

Although proponents of *Espinoza* and cases following the holding in *Espinoza* might interpret *Butler* as changing *Roberson* to affect an outcome on the certified issue now before us that is on all fours with *Espinoza*, we disagree. We continue to interpret *Roberson* to apply only to the invoked fifth amendment prophylactic pro-

tection of "having an attorney present to counteract the inherent pressures of custodial interrogation . . . ." *Roberson*, 486 U.S. at 685.

We do not read *Butler* and *Roberson* as affecting a transmutation of the sixth amendment right to counsel into a fifth amendment right to counsel. We hold that a defendant does not invoke his or her fifth amendment right to counsel by invoking the sixth amendment right to counsel at an initial appearance.

The fifth amendment right to counsel recognized in *Miranda* is not one that attends a criminal suspect under all circumstances and in every situation. Rather, it attaches only when an accused is in custody, *United States v. Henry*, 447 U.S. 264, 273 n. 11 (1980), and subject to custodial interrogation. *Rhode Island v. Innis*, 446 U.S. 291, 198 (1980). An accused may well be in custody at an initial appearance, but he is not being subjected to interrogation. Thus, there is no fifth amendment right to counsel at an initial appearance. When an accused invokes his sixth amendment right to counsel at that appearance, there is no basis for concluding that he is invoking his fifth amendment right to counsel.

Connecticut v. Barrett, 479 U.S. 523, 528 (1987), which discusses the fifth amendment right to counsel, instructs that one should examine the issue by "reference to [the] prophylactic purpose" of *Miranda* and, therefore, of the *Edwards* rule. By doing this, one reaches the conclusion that a sixth amendment request for counsel at an initial appearance should not be deemed an invocation of the fifth amendment right to counsel that would trigger the *Edwards* rule. The *Edwards* rule is "designed to insulate the exercise of Fifth Amendment rights from the government 'compulsion, subtle or otherwise,' that 'operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.'" *Barrett*, 479 U.S. at 528.

There might well be legitimate concern that a reinitiation of interrogation after a request for counsel at an interrogation session or in response to *Miranda* warnings would constitute "subtle compulsion" because it might lead a defendant to question whether the police really intend to honor his right to counsel. However, when an accused has not requested counsel in the context of custodial interrogation or in response to *Miranda* warnings pursuant to the fifth amendment, but rather invokes his sixth amendment right at his initial appearance on a criminal charge, it is difficult to see what "subtle compulsion" would exist if the police were to approach the defendant and seek to interrogate him on an unrelated crime after providing a full warning of his *Miranda* rights, including the right to counsel.

The defendant relies on language in *Jackson*, 475 U.S. at 633-34 n.7, for his position that a request for counsel at an initial appearance invokes the fifth amendment right to counsel. The proffered language from *Jackson* states:

> Although judges and lawyers may understand and appreciate the subtle distinctions between the Fifth and Sixth Amendment rights to counsel, the average person does not. When an accused requests an attorney, either before a police officer or a magistrate, he does not know which constitutional right he is invoking, he therefore should not be expected to articulate exactly why or for what purposes he is seeking counsel. It makes little sense to afford relief from further interrogation to a defendant who asks a police officer for an attorney, but permit further interrogation to a defendant who makes an identical request to a judge. The simple fact that defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly.

Defendant's reliance is misplaced. In that passage, the Supreme Court is quoting a passage from the Michigan Supreme Court's decision in *People v. Bladel*, 421 Mich. 39, 63-64, 365 N.W.2d 56, 67 (1984). However, the Michigan Supreme Court in its decision expressly held that a defendant who requests counsel at an arraignment only invokes the sixth amendment right to counsel and does not thereby invoke his fifth amendment right to counsel. *Bladel*, 421 Mich. at 52-53, 365 N.W.2d at 62; *see also Jackson*, 475 U.S. at 630 n.4 (noting that the Michigan court did not rely on the fifth amendment and expressly refusing to comment on the Michigan court's fifth amendment analysis).

The language in *Jackson*, which requires a broad interpretation to be accorded a defendant's invocation of his sixth amendment right to counsel, does not mean that the court must transmute the invocation of that right into an invocation of another right, the fifth amendment right to counsel. Rather, in context, the *Jackson* decision used the quoted passage from *Bladel* in an attempt to assess how broadly to interpret the defendant's invocation of only his sixth amendment right to counsel. The *Jackson* court refused to accept the state's argument that the defendant's sixth amendment request for counsel in *Bladel* was a limited invocation applying only to representation in formal legal proceedings. Instead, the Court stated that "the settled approach to questions of waiver" required a broad interpretation be placed on the defendant's request. *Jackson*, 475 U.S. at 633.[2] The breadth of one's invocation of the sixth amendment right to counsel is clearly not at issue in the case now before us. At issue is whether invocation of the sixth amendment right to counsel automatically transforms into an invocation of the fifth amendment right to counsel.

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[2] The facts in *Bladel* are distinguishable from those in the case now before us in that at all times *Bladel* concerned only three counts of first-degree premeditated murder upon which Bladel was arraigned.

In *Barrett*, 479 U.S. at 529, the Supreme Court analyzed the defendant's unambiguous invocation of his fifth amendment right to counsel at a custodial interrogation and the scope of his invocation and gave it the broadest possible interpretation on consideration of waiver. The *Barrett* Court concluded that a fifth amendment request for counsel at a custodial interrogation before defendant would give police a written statement did not prohibit the police from obtaining and using at trial oral statements volunteered by the defendant. The court rejected the defendant's argument that "broad effect" must be given "to requests for counsel that [are] less than all-inclusive." The Supreme Court stated:

> Barrett made clear his intentions [he was willing to give an oral statement, but not a written statement in the absence of counsel] and they were honored by police. To conclude that respondent invoked his right to counsel for all purposes requires not a broad interpretation of an ambiguous statement, but a disregard of the ordinary meaning of respondent's statement.

479 U.S. at 529-30. (Footnote omitted.)

The "ordinary meaning" of a defendant's request for counsel at an initial appearance is only that he is invoking his sixth amendment right to counsel in the pending prosecution. When a defendant invokes his sixth amendment right to counsel in a pending prosecution by requesting or accepting counsel at the initial appearance, it need not be viewed as an invocation of the fifth amendment right precluding interrogation on unrelated crimes any more than the limited invocation of the fifth amendment right to counsel in *Barrett* needed to be viewed as an invocation of the full fifth amendment right.

Other jurisdictions agree with our holding which rejects the *Espinoza* rationale and keeps the prophylactic protections provided under the fifth amendment right to counsel separate from the sixth amendment right to

counsel. The Michigan Supreme Court in *People v. Crusoe*, 433 Mich. 666, —— N.W.2d ——, 1989 Mich. LEXIS 2823, 27 [*31] (Dec. 8, 1989), refused to extend the *Roberson* rationale beyond its express fifth amendment application to include extension of the sixth amendment invocation of right to counsel to shield the defendant from postarraignment interrogations on unrelated charges. In so holding, the *Crusoe* court expressly rejected and reversed the court of appeals decision which adopted the analysis of *Espinoza*: "We find no authority for the adoption of a rule that a defendant's request for court appointed counsel at an arraignment invalidates a waiver of a defendant's right to counsel per se under *Miranda* during a subsequent police-initiated interrogation concerning a different and unrelated offense." (Footnote omitted.) (Citing *United States v. Roberts*, 869 F.2d 70, 74 (2d Cir. 1989)).

The Second District Court of Appeals in *United States v. Roberts*, 869 F.2d 70, 74 (2d Cir. 1989), asserted that the situation before it was "quite different from [that] of *Edwards*, *Jackson* and *Roberson*." That court said: "Roberts would have us hold that, once an accused's Sixth Amendment right to counsel attaches, his Fifth Amendment rights become unwaivable in the context of a separate investigation. Such a conclusion comports with neither the letter nor the spirit of *Edwards* and its progeny." *Id.*

The court in *State v. Stewart*, 113 Wash. 2d 462, 780 P.2d 844, 853 (1989) offered an identical conclusion:

> In the end, we hold Stewart's Sixth Amendment right to counsel did not attach on these burglary charges until months after his confessions. He did not invoke his Fifth Amendment right to counsel when he requested an attorney at an arraignment on an unrelated charge. The Fifth Amendment right to counsel exists solely to guard against coercive, and therefore unreliable, confessions obtained during

> in-custody interrogation, which was not occurring at the time Stewart requested counsel. Subsequently, prior to giving his confession, Stewart was given *Miranda* warnings and did not invoke his Fifth Amendment right at that time. There has been no showing of confusion on the part of the defendant, nor trickery on the part of the State. Extension of the *Edwards* rule to this fact scenario would constitute a misapplication of that prophylactic rule.

The defendant next complains that there was an unreasonably long detention before his initial appearance on the Racine county charges that requires suppression under the rule in *Phillips v. State*, 29 Wis. 2d 521, 534, 139 N.W.2d 41 (1966). Regarding the nature of the *Phillips* rule and what is ultimately at issue when a *Phillips* claim is raised, this court has stated:

> The suppression of sew-up confessions is based on the rule that a defendant who has not yet been charged may be taken into custody and interrogated only for a period reasonably necessary for the State to decide whether to release him or to make a formal complaint. A detention for any longer period violates due process and renders any confession obtained during the unreasonable period inadmissible. *Briggs v. State*, 76 Wis. 2d 313, 323, 251 N.W.2d 12 (1977); *Klonowski v. State*, 68 Wis. 2d 604, 229 N.W.2d 637 (1975); *Phillips v. State*, 29 Wis. 2d 521, 534-5, 139 N.W.2d 41 (1966). However, 'A confession does not become inadmissible as a "sew-up" confession merely because the state, prior to the confession, had information sufficient to sustain a charge. The question revolves solely on the point whether the delay was inordinate and the detention illegal.' *Briggs v. State, supra* at 324; Krueger v. State, 53 Wis. 2d 345, 357, 192 N.W.2d 880 (1972).

State v. Benoit, 83 Wis. 2d 389, 404-05, 265 N.W.2d 298 (1978).

We hold that the facts of this case are not consistent with a conclusion that the *Phillips* rule was violated. McNeil promptly appeared before a judicial court commissioner on the Milwaukee county armed robbery charge for which he had been arrested and for which he was in custody. The timely appearance rendered his subsequent detention in the Milwaukee county jail lawful. The statements regarding his conduct in Racine county were given while he was in lawful custody in Milwaukee county.

The defendant's argument on this issue then seems to switch from the due process concerns of the *Phillips* rule to an examination of a possible sixth amendment violation under *State v. Lale*, 141 Wis. 2d 480, 415 N.W.2d 847 (Ct. App. 1987). Here, McNeil suggests that the state deliberately delayed filing the Caledonia murder charges as a pretext to allow further investigation of these unfiled charges without fear of violating his sixth amendment right to counsel. This is a direct reference to principles discussed in *Lale* wherein the court of appeals adopted as law combined interpretations of *Moulton*, 474 U.S. 159, and *Burbine*, 475 U.S. 412, which state that a defendant's sixth amendment right to counsel is not involved when the police obtain incriminating statements on unfiled charges that are unrelated to a filed charge.

The court of appeals in *Lale* noted the existence of a possible exception to this rule which the defendant argues is applicable here. The exception states that a possible violation of the sixth amendment may occur when "the government formally files on some charges but delays filing of another charge as a pretext to facilitate investigation of that unfiled charge without being hampered by the sixth amendment . . . ." *Lale*, 141 Wis. 2d at 489. The court of appeals suggested that under such circumstances "bad faith may exist." *Id.*

Here, on December 14, 1987, at the defendant's hearing on the motion to suppress the confession, the trial court on the facts presented expressly refused to find any bad faith in how the authorities handled this case. The court specifically stated:

> I don't think there has been any showing that there was conduct in bad faith being done here. I think the officers who were going through this in a case which involves a defendant who was involved in lots of different problems. Involved in several different investigations. Certainly from the testimony that's come through here, I don't think there's been any showing like that at all.

The trial court's findings of fact on the bad faith issue will not be overturned unless clearly erroneous. *State v. Owens*, 148 Wis. 2d 922, 929, 436 N.W.2d 869 (1989). Here, the defendant has offered no showing to support a determination that the trial court's findings were clearly erroneous. Thus, the trial court's refusal to find bad faith removes this case from the *Lale* exception, and we agree with the trial court that McNeil's sixth amendment right to counsel under the *Lale* theory has not been violated.

The defendant next claims his statements should have been suppressed because the police did not "scrupulously honor" his request to remain silent as they are required to do under the United States Supreme Court's decision in *Michigan v. Mosley*, 422 U.S. 96 (1975). Determining whether the right to silence has been scrupulously honored required the application of constitutional principles to the facts of the case and is subject to independent appellate review.

There are five factors that are to be considered in deciding whether an invocation of the right to silence has been "scrupulously honored." Those factors as adopted from *Mosley*, 423 U.S. at 104-05 and as enumerated in

State v. Hartwig, 123 Wis. 2d 278, 284, 366 N.W.2d 866 (1985), are:

> (1) The original interrogation was promptly terminated. (2) The interrogation was resumed only after the passage of a significant period of time . . . . (3) The suspect was given complete *Miranda* warnings at the outset of the second interrogation. (4) A different officer resumed the questioning. (5) The second interrogation was limited to a crime that was not the subject of the earlier interrogation.

The factors are not to be woodenly applied. *Id.* at 284-85. They provide a framework of analysis to aid in determining the essential issue of whether the defendant's right to silence was scrupulously honored. *Id.*

All five factors are satisfied in this case. The defendant initially invoked his right to silence and the interrogation was terminated. The questioning was resumed after the passage of a significant period of time, either one or two days depending on the version accepted, the defendant's or the police. *Cf. State v. Turner*, 136 Wis. 2d 333, 357, 401 N.W.2d 827 (1987) (periods of 20 and 24 hours have been deemed significant time spans for *Mosley* purposes).

Prior to the second and subsequent interrogations, the defendant was given a full and complete set of *Miranda* warnings.[3] The officers conducting those interrogations made sure the defendant understood each of the rights about which the warnings advised the defendant and secured an express waiver of them.

A different officer, Officer Butts, resumed the questioning at the second interrogation. The defendant's initial invocations of his right to silence were made when Detective Smukowski attempted to interrogate him. The

[3] The advice given by the dissent was fulfilled by the officers in this case and served as part of the basis for the majority opinion.

subsequent interrogations were conducted by different officers. The second and subsequent interrogations were restricted to a crime that had not been the subject of the initial interrogation.

Prior to his arrest and return to Milwaukee, the defendant's girlfriend had told Officer Butts who initiated the second interrogation after the defendant invoked his right to silence that he (the defendant) "wanted to talk to [the officer] when he got back to Milwaukee." With this indication of a desire to talk to the interrogating officer, it does not appear that McNeil's previously invoked right to silence was not scrupulously honored when that officer approached him and, after giving *Miranda* warnings, determined that the defendant was willing to talk to him about his part in the Racine county town of Caledonia crimes.

The defendant immediately raised to the police the subject of the Caledonia incident that provided the basis for the charges in this case. Notwithstanding his initial invocation of his right to silence regarding the West Allis case when he was interrogated in Omaha, the defendant affirmatively wanted to speak to the police about the Caledonia crime at issue in this case. Under the circumstances, there is no basis for finding that his right to silence was not scrupulously honored.

The defendant also argues that he should be allowed to withdraw his guilty plea and should be granted a new trial. He bases his request on the theory of ineffective assistance of counsel. The ineffective assistance of counsel argument, which was raised in McNeil's notice of motion and motion to withdraw the guilty plea, was based on trial counsel's failure to originally brief and argue the *Espinoza* case on pretrial motions to suppress evidence.

A hearing was held on the motion to withdraw the guilty plea at which the *Espinoza* case was argued. Ex-

hibits were also accepted into evidence which established that the defendant had been before a Milwaukee county magistrate in the morning hours of May 22, 1987, on the Milwaukee robbery charges and that he was represented by a state public defender at that time. In relevant part, the trial court's decision on the motion stated:

> The Court having heard testimony and having read the law presented by the parties makes the following Findings of Fact:
>
> That defense counsel's performance was deficient . . . .
>
> The Court, after looking at the whole record, finds that its decision on motions to suppress would have been the same even if that case would have been argued, as there are no Wisconsin cases upon which the Court could have relied. Therefore, the motion of the defendant is denied.

In briefs reviewed by this court, McNeil states that his ineffective assistance of counsel argument is made moot by the trial court's hearing and decision on the issue. We agree. The argument was made on reliance of case law that was not and is not precedent in the state of Wisconsin. McNeil's defense was therefore not prejudiced by trial counsel's failure to expressly argue *Espinoza*.

McNeil then apparently changes his argument on brief on this issue to assert that the defendant's sole basis for entering a no contest plea was the trial court's denial of his suppression motion. He argues that the denial of his motion violated his constitutional rights and therefore justifies reversal of his conviction and a new trial. This amounts to an argument that the trial court committed prejudicial error by denying the motion. Because we hold against McNeil on all of the issues presented in this case and because a conclusion that the trial court committed prejudicial error depends upon our holdings here,

we hold that the trial court did not commit prejudicial error when it denied the suppression motion.

By the Court.—The order of the Racine county circuit court is affirmed.

CHIEF JUSTICE HEFFERNAN (dissenting). The majority concludes that an accused who requests counsel at an initial appearance and remains in continuous custody has not invoked the fifth amendment right to counsel which precludes police-initiated interrogation on unrelated, uncharged offenses. I disagree.

The majority states that the issue is whether invocation of the sixth amendment right to counsel automatically transforms into an invocation of the fifth amendment right to counsel. (Majority op. at p. —.) The fifth amendment protection against self-incrimination provides the right to counsel at custodial interrogations, irrespective of whether a defendant has been formally charged or not. *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Arizona v. Roberson*, 486 U.S. 675 (1988). Hence, the issue in this case is whether the defendant invoked his fifth amendment right to counsel when he requested assistance of counsel at an initial appearance instead of while being interrogated afterwards.

I am persuaded that the reasoning of the Seventh Circuit Court of Appeals in *United States ex rel. Espinoza v. Fairman*, 813 F.2d 117 (7th Cir. 1987), cert. denied. *Fairman v. Espinoza*, 483 U.S. 1010 (1987), is correct and should be followed by this court. *Espinoza* holds that, when a defendant requests[1] an attorney at an initial

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[1] In *Espinoza*, the defendant accepted the appointment of counsel, but did not specifically request counsel. The *Espinoza* court concluded that the defendant's unqualified acceptance of counsel at his arraignment was equivalent to a request for counsel and that it was not necessary for the defendant to specifically request counsel in order to invoke this right. 813 F.2d at 123.

appearance and remains in custody, the court should presume that the defendant has invoked his fifth amendment right to counsel and police-initiated interrogation is thereafter prohibited on any crime. *See Edwards v. Arizona*, 415 U.S. 477 (1981), and *Arizona v. Roberson*, 486 U.S. 675 (1988).

The majority rejects the Seventh Circuit's approach by distinguishing between a defendant who makes a request for assistance of counsel to a police officer while subject to a custodial interrogation and a defendant who makes a request for assistance of counsel to a magistrate and thereafter remains in continuous custody. The majority asserts that, while a defendant is in custody at an initial appearance, he is not being interrogated. Because the defendant is not being interrogated when he makes his request for an attorney, the majority leaps to the conclusion that there is no danger of compelled testimony and, therefore, the fifth amendment right to counsel which arises from the protection against self-incrimination is not implicated. The majority misreads the holdings of *Miranda v. Arizona*, *supra*, and *Edwards v. Arizona*, *supra*.

Miranda established that the fifth and fourteenth amendmentst require that, prior to any custodial interrogation, defendants be informed of their right to remain silent and their right to have counsel present "during custodial interrogation." *See Edwards*, 451 U.S. at 481-482. This does not mean that the *request* for counsel must be made "during custodial interrogation." In *Edwards v. Arizona*, the Supreme Court established a bright-line rule that, if a defendant requests counsel while in custody, police-initiated interrogation must cease until an attorney is present. *Edwards* added protection to prevent police from badgering a defendant into waiving previously asserted *Miranda* rights. *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983). Nowhere does *Edwards* or any of its progeny indicate accuseds must assert their *Miranda* right to counsel while they are being interrogated. The request must be made while the defendant is in custody, prior to, or during, an interrogation.

It is apparent that there is danger of "subtle compulsion" when a defendant requests the assistance of an attorney at an initial appearance and is nevertheless subjected to further interrogation while custody continues. Whether a request for an attorney is made to a police officer or to a judge, whether in the jail or during an initial appearance, the dangers of the inherent pressure of custodial interrogation when not having an attorney present are the same. Just as the *Edwards* protection is not dependant upon the subject matter of the interrogation, neither is this protection dependent upon whether the request for assistance of counsel is made to a police officer while in custody or to a magistrate at an initial appearance before the defendant is interrogated.

Finally, I disagree with the majority that recent United States Supreme Court decisions provide support for its position. To the contrary, recent Supreme Court decisions support the Seventh Circuit Court of Appeals decision in *Espinoza*. First, in *Arizona v. Roberson*, 486 U.S. 675 (1988), the Court resolved a conflict among the circuits and state courts, accepting the position taken by the Seventh Circuit in *Espinoza*, 486 U.S. at 679, n.3. The *Roberson* court held that, when a suspect requests counsel, the fifth amendment bars police-initiated interrogation on any crime, even one which was not the subject of the original interrogation. Recently, in *Butler v. McKellar*, —— U.S. —— (March 5, 1990) (formerly reported at *Butler v. Aiken*), the Supreme Court held that *Roberson* could not be applied retroactively in cases on collateral review and, for that reason, the particular defendant could not reap the benefit of the rationale of the *Espinoza* court. The issue raised before the Court of Appeals in *Butler* was whether *Espinoza* required the police, during continuous custody, to refrain from all further questioning on any offense once an accused invokes his

right to counsel. In resolving this issue, the Fourth Circuit Court of Appeals rejected the Seventh Circuit's holding in *Espinoza*. *Butler v. Aiken*, 846 F.2d 255 (4th Cir. 1988). After the Supreme Court issued its decision in *Roberson*, the Fourth Circuit Court of Appeals, on defendant's petition for rehearing, acknowledged that its decision, rejecting the *Espinoza* rationale, was doubtful but that the defendant was not entitled to the retroactive benefit of *Roberson*, 864 F.2d 24, 25 (4th Cir. 1988), *reh'g denied*. The Supreme Court agreed that Butler was not entitled to a retroactive application of *Roberson*. The court noted the discrepancy between the Seventh Circuit and the Fourth Circuit as evidence that the outcome in *Roberson* was not clear from the earlier holding in *Edwards* and therefore constituted a "new rule," hence, not calling for retroactive application. While the Supreme Court limited its holding to the retroactive application of *Roberson*, its approval of *Espinoza* is significant. I conclude that the *Espinoza* court's analysis of the fifth amendment right to counsel is correct and implicitly has been approved by the United States Supreme Court. Therefore, law enforcement officers may be well advised to comply with *Miranda-Edwards* standards whenever a suspect is interrogated under the circumstances here.[2] Reliance on the majority's view of

[2] I would like to clarify that our advice was not followed by these officers and does not serve as part of the majority's opinion. The majority misinterprets *Miranda* and its progeny. It is true that the officers in this case gave *Miranda* warnings to the defendant before they interrogated him and after he invoked his fifth amendment right to counsel by requesting an attorney at his initial appearance. *Miranda*, however, stands for more than the prophylactic rule that requires law enforcement officers to inform defendants of their right to counsel. *Miranda* recognized the already existing fifth amendment right to have counsel present at custodial interrogations. The fifth amendment right to counsel, as interpreted in *Edwards*, requires that police-initiated interrogation cease with respect to any crime once the defendant has invoked that right. Accordingly, it was not enough for the police officers in this case to read the defendant his *Miranada* rights again. The fifth amendment requires that police-initiated interrogation must cease.

what constitutes a constitutionally antiseptic confession may result in the suppression of crucial evidence. It would appear to this writer to be prudent to follow *Espinoza* by assuming that defendants who request assistance of counsel at an initial appearance and remain in custody have thereby invoked their fifth amendment right to counsel, and police-initiated interrogation is thereafter prohibited in respect to any crime unless the suspect waives his right to counsel.

I respectfully dissent and would reverse the trial court's judgment of conviction.

I am authorized to state that Justice Shirley S. Abrahamson and Justice William A. Bablitch join in this dissent.

SUPREME COURT OF THE UNITED STATES

No. 90-5319

PAUL MCNEIL,

Petitioner

v.

WISCONSIN

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 29, 1990